In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 220

JAMES HOWELL SMITH AND MARVIN SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. V) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1965 (R. V). On May 4, 1965, Mr. Justice Stewart extended the time for filing petitions for writs of certiorari to and including June 5, 1965, and the joint petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were entitled to a preliminary hearing when an indictment intervened before the date set for the hearing.

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2. Whether statements in furtherance of a joint venture made out of the presence of petitioner Marvin Smith were properly admitted against him.

3. Whether the evidence was sufficient to support petitioners' convictions.

4. Whether the trial court properly denied a motion for a new trial based on alleged newly discovered evidence relating to the credibility of a government informer.

STATEMENT

Petitioners were charged in an indictment in six counts returned in the United States District Court for the Southern District of Ohio with the sale of heroin on February 25, 1963, and March 1, 1963 (R. I, 1). The jury found petitioners guilty on all six counts (R. I, 9, 10). James Smith was sentenced to imprisonment for seven years and Marvin Smith for ten years (R. I, 12, 13). On appeal (R. I, 15), the convictions were affirmed. The evidence may be summarized as follows:

On February 25, 1963 (counts 1, 2, 3), from the office of narcotics agent Ginetz, in Cincinnati, Ohio, Cohen, a government informer,[1] telephonically arranged a meeting with petitioner James Smith to purchase narcotics. Cohen and his car were searched by officers; he was given $60 to make the purchase,

[1] Cohen admitted that he was a narcotics user and had prior convictions for State and federal narcotics offenses (R. IV, 3–4). He had purchased heroin from James Smith on about five occasions in 1962 and early 1963 (R. IV, 5–7, 10–12).

and he then drove to James Smith's apartment with agent Ginetz hidden in the trunk of the car (R. IV, 12–13, 15–16, 104–109; R. III, 3–4, 20–21). When James Smith entered Cohen's car, he offered to sell a half spoon of heroin for $60, and Cohen agreed (R. IV, 17, 113–114). Cohen and James Smith drove to a second-floor apartment on Greenwood Avenue where Marvin Smith and a man named Steve were present (R. IV, 18, 115). While Steve left to obtain hypodermic needles, James Smith, Marvin Smith and Cohen all inhaled some of James Smith's cocaine (R. IV, 21–22). When Steve appeared with the needles, Marvin Smith went out and returned with several caps of heroin which he handed to James Smith. Cohen and James Smith both took injections of the heroin. Cohen said he liked it and would buy some (R. IV, 22).

Cohen and James Smith left in Cohen's car for Lincoln Heights, Ohio, to obtain heroin. During the trip, James Smith said that he and Marvin Smith had plans to become the largest dealers in the area and were going to take over the entire narcotic traffic in southern Ohio (R. IV, 23, 116).[2] James Smith then borrowed Cohen's car and drove away. He picked up Cohen again about 10 minutes later. In the car James Smith gave Cohen a package of heroin for which Cohen paid him $60 (R. IV, 24, 118–119). There were no Internal Revenue stamps on the package and no written order form for the sale (R. IV, 24–25). The two men returned to the Greenwood

[2] Both Cohen and agent Ginetz were permitted to testify to these statements over defense objection.

apartment where they found Marvin Smith. Cohen and Steve then took heroin injections (R. IV, 25–26, 120). Petitioners James Smith and Marvin Smith excused themselves to talk business in the kitchen, and Cohen saw money passing between them. After Cohen drove away from the apartment, he opened the trunk and gave the package of heroin to Ginetz (R. IV, 27).

On March 1, 1963 (counts 4, 5, 6), a similar procedure was followed, and Ginetz again hid in the car trunk (R. IV, 28–29, 125–126; R. III, 6–7, 22–23). James Smith and Cohen parked in front of a nightclub at Lincoln Heights where they met Marvin Smith (R. IV, 29). Ginetz again heard James Smith say that he and his partner, Marvin Smith, were going to take over the entire narcotic business in southern Ohio (R. IV, 128). Cohen went into a drugstore to buy a hypodermic needle (R. IV, 29). While Cohen was gone, Ginetz overheard James Smith tell Marvin Smith that they should watch Cohen "hit" (take a narcotics injection) on the theory that police do not use narcotics. Marvin Smith said that he had a whole boxful of "nails" (hypodermic needles) (R. IV, 130–132). James Smith then went into the drugstore and told Cohen that he did not need any needles. He gave Cohen a package of unstamped heroin, for which there was no order form and for which Cohen had previously paid him $75 (R. IV, 30–31). Upon getting into the car, James Smith said to Cohen, "Follow my man [Marvin Smith]." They then drove to a house on McIntyre Street (R. IV, 132, 31). Marvin Smith went outside and returned with a package of hypo-

dermic needles, after which Cohen and James Smith took injections of heroin (R. IV, 31–32). After Cohen drove away, he opened the trunk and gave the package of heroin to Ginetz (R. IV, 32–33, 133–134).

On March 8, 1963, a similar pattern of conduct occurred at the house on McIntyre Street where Cohen and James Smith took injections of heroin (R. IV, 33–36, 136–139; R. III, 8–12, 25–28, 30–36). Marvin Smith complained of "heat" all over the neighborhood and asked Cohen for the return of a package of heroin. Cohen gave the heroin to Marvin Smith and recovered his purchase money from James Smith (R. IV, 36). Upon hearing a knock at the door Marvin Smith said, "That's the heat", grabbed the package, and went into the bathroom. Cohen then heard the toilet flush (R. IV, 38).

ARGUMENT

1. Petitioners were arrested and brought before a commissioner on March 8, 1963, and a preliminary hearing was scheduled for March 29, 1963. No hearing was held, since petitioners' indictment was returned on March 15, 1963 (R. I, 1). The failure to hold a preliminary hearing after indictment was not error. Petitioners knew the general nature of the charges when they were first arrested, and they learned the specific accusation when the indictment was returned approximately one week thereafter. The Federal Rules of Criminal Procedure do not contemplate a preliminary hearing *after* the return of an indictment. Since the principal purpose of a preliminary

examination under Rule 5(c), F.R. Crim. P., is to determine whether there is sufficient evidence against an accused to warrant his being held for action by a grand jury, such a hearing is superfluous after an indictment has been returned. At that time, it is established that the grand jury has found probable cause to accuse the defendant. *Barber* v. *United States*, 142 F. 2d 805, 807 (C.A. 4), certiorari denied, 322 U.S. 741. See, also, *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 400; *Byrnes* v. *United States*, 327 F. 2d 825, 834 (C.A. 9), certiorari denied, 377 U.S. 970; *Barrett* v. *United States*, 270 F. 2d 772, 775–776 (C.A. 8).[3]

2. There was no error in admitting into evidence against petitioner Marvin Smith conversations between James Smith and Cohen regarding Marvin Smith's involvement in the narcotics traffic. Even though no conspiracy was charged, the evidence showed that both petitioners were concertedly engaged in selling narcotics. The challenged declarations by James Smith were in furtherance of that joint venture since they were designed to assure Cohen—who was believed to be a customer—that the source of supply would continue. As such, the declarations were admissible against an absent joint venturer such as Marvin Smith. *United States* v. *Pugliese*, 153 F. 2d 497, 500

[3] The Court of Appeals for the District of Columbia has, it is true, suggested a procedure whereby a defendant's right to a preliminary hearing before indictment is made secure, but that court refused to reverse a conviction where the preliminary hearing had not been held. *Blue* v. *United States*, 342 F. 2d 894. Petitioners in this case did not seek to have the hearing held earlier than March 15.

(C.A. 2); *Fuentes* v. *United States*, 283 F. 2d 537, 539–540 (C.A. 9); *Williams* v. *United States*, 289 F. 2d 598, 601–602 (C.A. 9); *United States* v. *Annunziato*, 293 F. 2d 373 (C.A. 2), certiorari denied, 368 U.S. 919.

3. The evidence was sufficient to support petitioners' convictions. With respect to James Smith, the testimony of Cohen, corroborated in part by that of agent Ginetz, established that James Smith passed narcotics to Cohen and received money in both sales. As for Marvin Smith, the evidence showed that during the first sale on February 25, 1963, he produced several caps of heroin which Cohen tested prior to deciding upon a purchase; and the jury could reasonably infer that some of the money Cohen saw passing between the two petitioners was what he had paid James Smith for narcotics. On March 1, 1963, Marvin Smith met with Cohen and James Smith just prior to the second sale, and later produced a package of hypodermic needles which Cohen and James Smith used in taking injections. As the court below observed, Marvin Smith was at least "an aider and abetter, if not a full fledged principal" (Pet. 15). See *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *Pereira* v. *United States*, 347 U.S. 1, 9–11.

4. On February 2, 1964, petitioner James Smith filed a motion for a new trial on the ground of newly discovered evidence (R. III).[4] The court of appeals thereupon ordered the appeal held in abeyance until certification by the trial court as to whether it would grant or deny the motion if the case were remanded

[4] Petitioner Marvin Smith apparently filed a later motion for a new trial similar to that of James Smith.

for a ruling upon it (R. V). On December 8, 1964, the district court entered an order stating, *inter alia* (R. V):

> After a full review of the evidence and authorities, it is our judgment that the so-called newly discovered evidence might at most tend to impeach the credibility of a witness whose testimony was in large measure corroborated, and it is not probable that such evidence would produce an acquittal. * * *
>
> Certification is therefore made that the Motions for a New Trial would not be sustained if the case were remanded.

There is no occasion to review the district court's exercise of discretion in denying the motion.[5] *United States* v. *Johnson,* 327 U.S. 106. Cohen was known to the jury to have worked for the government, and he admitted on cross-examination that he had three previous narcotics convictions and one such pending (R. IV, 44). Since Cohen's testimony was corroborated to a considerable extent by that of agent Ginetz and three Cincinnati policemen who joined in the surveillance, the court properly found that the evidence offered did not warrant a new trial.

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[5] Petitioner has not filed with the record a transcript of the testimony at the hearing on the motion for a new trial. He alleges (Pet. 7–8) that this testimony showed that after Cohen had testified in the instant federal case, agent Ginetz arranged for the reduction in a State case of Cohen's bond from $2,000 to $225, which Ginetz posted; that Ginetz admitted discussing with a State prosecutor the possibility of getting probation for Cohen in the State case; and that Cohen was in fact given probation.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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